Filed 12/17/12 County of San Diego Dept. of Child Support Services v. Smart CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO DEPARTMENT OF CHILD SUPPORT SERVICES, Plaintiff and Respondent, v. GREGORY A. SMART, SR., Defendant and Appellant.	D060695 (Super. Ct. No. DF228496)

APPEAL from an order of the Superior Court of San Diego County, Kelly C. Doblado, Commissioner. Affirmed.

In an action initiated by the County of San Diego Department of Child Support Services (the Department) to recoup public expenditures for child support provided to his two minor sons, Gregory A. Smart, Sr. appeals a pendente lite order directing him to pay $136 in monthly child support to the California State Disbursement Unit (CSDU). Smart contends the order violates his federal constitutional rights because he was not provided

counsel at public expense. Because Smart has no constitutional right to appointed counsel in this action, we affirm the challenged order.

BACKGROUND

The Department commenced an action against Smart in which it sought, among other relief, an order requiring him to pay child support of $136 per month for two minors alleged to be his sons (hereafter, the recoupment action). In its complaint, the Department alleged it had been providing public assistance to the minors and sought an order requiring Smart to make monthly payments to CSDU as reimbursement.

Smart filed an answer in the recoupment action in which he denied paternity and asserted he "need[ed an] attorney appointed." Smart also moved for an order for genetic testing, claiming he was not living with his wife when the minors were conceived and neither resembled him.

Smart was also involved in three related family law matters, including a marital dissolution action with his wife, all of which the court ordered heard with the recoupment action. In the marital dissolution action,[1] the court appointed counsel to represent Smart

---

1 We grant the Department's unopposed request for judicial notice of certain records from the marital dissolution action, because the records are helpful to an understanding of the case. (See Evid. Code, §§ 452, subd. (d), 459, subd. (a); *Morson v. Superior Court* (2001) 90 Cal.App.4th 775, 780, fn. 4.)

on the paternity issue;[2] and in the recoupment action, the court ordered genetic testing "for informational purposes."

In the recoupment action, Smart executed a form labeled "PATERNITY: RIGHTS AND OBLIGATIONS, ADMISSION, COURT'S FINDINGS," in which he waived his rights to a court trial, to confront and cross-examine witnesses against him, and to "the aid of counsel (court-appointed, if necessary) during these proceedings." Smart also admitted the two minors were his sons.

Based on Smart's waivers and admissions, the court in the recoupment action found Smart was the father of the minors, relieved appointed counsel, and ordered Smart to pay monthly child support of $136. Eight days later, Smart filed a notice of appeal from the order "dismissing attorney/not granting attorney."[3]

DISCUSSION

Smart contends he "is 'innocent' per se but does not know how to establish his innocence without the assistance of counsel." He complains "there are no checks and balances in place" because he "is not trained in the science of law" and "cannot afford to

---

2 See *Salas v. Cortez* (1979) 24 Cal.3d 22, 34 (*Salas*) ("in proceedings to determine paternity in which the state appears as a party or appears on behalf of a mother or child, indigent defendants are constitutionally entitled to appointed counsel").

3 An order denying a request to appoint counsel is not appealable. (*Ponce-Bran v. Trustees of Cal. State University* (1996) 48 Cal.App.4th 1656, 1661-1662.) A pendente lite order for child support, however, is appealable. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368; *Alicia R. v. Timothy M.* (1994) 29 Cal.App.4th 1232, 1234, fn. 1.) Because the issue concerning the appointment of counsel is embraced within the order directing Smart to pay child support, we construe his notice of appeal as having been taken from that order. (See Cal. Rules of Court, rule 8.100(a)(2) ["The notice of appeal must be liberally construed."].)

hire an attorney," but the Department "has dozens of full time attorneys that are assigned exclusively to handling cases such as [this one]." Under these circumstances, Smart contends the "[f]ailure to appoint counsel is a violation of [his] sixth and fourteenth amendment rights and is just plain wrong." We disagree.

As an initial matter, we address the Department's argument that Smart forfeited his constitutional arguments. The Department contends Smart did not adequately raise the arguments below, expressly waived his right to appointed counsel, and did not object when the court relieved counsel after Smart admitted paternity. We are not persuaded.

The Department correctly points out that Smart signed an express waiver of his right to counsel. That waiver, however, concerned only the right to counsel as to the determination of paternity. The Department also correctly points out that the record does not indicate Smart objected when the family court relieved counsel after Smart admitted paternity, or specifically requested counsel on the child support issue. The record does indicate, however, that Smart requested appointment of counsel in his answer to the Department's complaint, in response to the Department's motion for judgment, and in his own motion for an order directing genetic testing. "We assume for sake of argument that this was sufficient to preserve the issue for appeal [citation]; however, we determine [Smart] had no right to appointed counsel in any event." (*People v. $30,000 United States Currency* (1995) 35 Cal.App.4th 936, 942; accord, *Guardianship of Ethan S.* (1990) 221 Cal.App.3d 1403, 1412.)

The Sixth Amendment to the United States Constitution gives Smart no right to appointed counsel in the Department's civil action to collect child support. As pertinent

here, the Sixth Amendment provides: "*In all criminal prosecutions*, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." (U.S. Const., 6th Amend., italics added.) The United States Supreme Court has held this Sixth Amendment right is applicable to the states through the due process clause of the Fourteenth Amendment, and requires states to appoint counsel for indigent defendants *in felony cases and other criminal cases resulting in a prison sentence*. (*Alabama v. Shelton* (2002) 535 U.S. 654, 661-662; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344-345.) Thus, the Sixth Amendment right to counsel "is guaranteed specifically in *criminal prosecutions.* The guaranty does not, by virtue of the specific language of [this] provision[], apply to civil proceedings." (*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 539-540; accord, *Chevalier v. Dubin* (1980) 104 Cal.App.3d 975, 978.) In short, "the Sixth Amendment does not govern civil cases." (*Turner v. Rogers* (2011) ___ U.S. ___, ___ [131 S.Ct. 2507, 2516].)

Nor does the Fourteenth Amendment's due process clause, apart from its incorporation of the Sixth Amendment right to counsel, require the appointment of counsel for Smart in this action. "[T]he general rule is that there is no due process right to counsel in civil cases." (*Walker v. State Bar* (1989) 49 Cal.3d 1107, 1116; accord *Iraheta v. Superior Court* (1999) 70 Cal.App.4th 1500, 1508 (*Iraheta*); *People v. $30,000 United States Currency*, *supra*, 35 Cal.App.4th at p. 942; *White v. Board of Medical Quality Assurance* (1982) 128 Cal.App.3d 699, 707.) The right of an indigent litigant to appointed counsel generally "has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." (*Lassiter v. Department of Social*

Services (1981) 452 U.S. 18, 25 (*Lassiter*); accord, *Walker*, at p. 1116.) When loss of physical liberty is not at stake, factors relevant to the determination whether due process requires appointment of counsel for an indigent litigant are "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." (*Lassiter*, at p. 27.) Courts "must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." (*Ibid.*)[4]

Applying the *Lassiter* balancing test, our colleagues in Division Three held that indigent parents have no due process right to be provided with counsel at public expense in actions seeking reimbursement of welfare payments received by their children through the establishment and enforcement of monthly child support obligations against the parents. (*Clark v. Superior Court* (1998) 62 Cal.App.4th 576, 581-587 (*Clark*).) The *Clark* court reasoned: (1) the private interest at issue, namely money, did "not weigh

---

4 The California Supreme Court used a similar balancing approach in reaching its conclusion that an indigent defendant is entitled to appointed counsel in paternity proceedings by the state. (*Salas, supra*, 24 Cal.3d at pp. 27-34.) The Supreme Court noted that a paternity proceeding involves the "authority to declare the existence of the most basic biological relationship, that of parent and child"; an "adjudication of paternity may profoundly affect a person's life"; and "[f]reedom from an incorrect imposition of that relationship on either a parent or a child is [a] . . . compelling interest." (*Id.* at pp. 27-28.) Thus, "the 'liberty interest' in *Salas* was based primarily on a recognized personal liberty interest—the parent-child relationship." (*Iraheta, supra*, 70 Cal.App.4th at p. 1510.) That weighty liberty interest is absent from this case, however, because the Department is not seeking to establish paternity. Rather, the Department is seeking solely to recoup public funds provided to support two minors who Smart admitted are his sons.

much" in favor of providing counsel at public expense (*id.* at p. 583); (2) the risk of an erroneous decision was "a less-than-average risk in terms of how it is affected by the quality of legal representation," because the calculation of the amount of child support is based upon a statutory mathematical formula (*id.* at p. 585); and (3) the government's interest was "particularly strong," because "elimination of expense was *itself* the motivation for the [enforcement of child support obligations] program in the first place" (*id.* at p. 586). Balancing these elements against one another and determining their net weight, the court concluded there was "certainly not enough weight to overcome the presumption against counsel at public expense in civil cases" and "reject[ed] the [parents'] claims that due process entitle[d] them to attorneys at public expense." (*Id.* at pp. 586-587.) We agree with *Clark*'s analysis and hold that Smart has no due process right to the appointment of counsel in this action.

Finally, Smart's unsupported assertion that it "is just plain wrong" not to provide him with counsel at public expense does not constitute a persuasive legal argument for reversal of the challenged order. As another court has noted, "there presently exists no statutory authority, explicit or implicit, to spend public moneys to pay counsel to defend indigents in actions brought by a county . . . to recoup expenditures for child support. [Citation.] Allocation of liability for payment of attorneys' fees in such causes is the prerogative of the Legislature and not of the courts." (*County of Los Angeles v. Superior Court* (1980) 102 Cal.App.3d 926, 930.) "If the Legislature wants to use tax dollars [to] supply free lawyers for deadbeat dads and moms . . . [,] then the Legislature must do so. But the state and federal Constitutions do not require it." (*Clark, supra,* 62 Cal.App.4th

at p. 592, italics omitted.) Hence, even if we agreed with Smart that as a policy matter it "is just plain wrong" not to provide him with counsel at public expense, we have no legal basis for reversing the court's order in this case.

DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

MCDONALD, J.